IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-464

CURTIN MATHESON SCIENTIFIC, INC., ET AL,
Petitioners

v.

C. M. RUSSELL, JR., ET AL,
Respondents

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

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SUBJECT INDEX

LIST OF AUTHORITIES

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully move this Court for leave to file the petition, hereto annexed, for a writ of certiorari, under section 1651 of Title 28 of the United States Code, directed to the United States Court of Appeals

for the Fifth Circuit, and alternatively to the United States District Court for the Southern District of Texas, Houston Division.

Respectfully submitted,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

OPINIONS BELOW

1. The initial opinion and order of the United States District Court for the Southern District of Texas is unofficially reported in 17 FEP 846 and is annexed hereto as Appendix 1.

2. The opinion and order of the United States District Court for the Southern District of Texas amending the

opinion attached hereto as Appendix 1 and certifying the controlling questions of law therein for interlocutory appeal pursuant to 28 U.S.C. 1292(b) is unreported and is annexed hereto as Appendix 2.

3. The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner leave to appeal from the interlocutory order, as amended, of the United States District Court for the Southern District of Texas is unpublished, and is annexed hereto as Appendix 3.

JURISDICTION

1. The initial opinion and order of the United States District Court for the Southern District of Texas denying Petitioners' Motion to Dismiss for Lack of Jurisdiction in this cause was dated and entered in the office of the clerk of that court on April 28, 1978 (Appendix 1).

2. The opinion and order of the United States District Court amending the opinion attached hereto as Appendix 1, and certifying the controlling questions of law therein for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was entered in the office of the clerk of that court on July 10, 1978 (Appendix 2).

3. The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner leave to appeal from the interlocutory order of the United States District Court for the Southern District of Texas was entered in the office of the clerk of the court of appeals on August 15, 1978 (Appendix 3).

4. This Court has jurisdiction to review the order of the United States Court of Appeals for the Fifth Circuit denying Petitioner leave to appeal from the District Court's interlocutory order and to review the United States District Court's opinion and order denying Petitioners' jurisdictional motion to dismiss, by common law writ of certiorari pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED

1. Question: When a district court has issued an order denying a defendant's jurisdictional motion to dismiss, but has certified the controlling questions of law therein for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the court of appeals has denied the defendant's subsequent application for leave to appeal from such interlocutory order, may the Supreme Court properly review by common law writ of certiorari to the court of appeals the question of whether the court of appeals "abused its discretion" in denying defendant leave to appeal, and the controlling questions of law in the district court's order?

2. Question: When a district court has issued an order denying defendant's jurisdictional motion to dismiss and has certified the controlling questions of law therein for interlocutory appeal, but the court of appeals has denied the defendant leave to appeal from such interlocutory order, may the Supreme Court properly review, by common law writ of certiorari to the district court, the merits of its opinion and order denying defendant's jurisdictional motion to dismiss?

3. Question: Under what circumstances is a claimant entitled to equitable tolling of the 180-day time period under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(d), within which to

file a timely notice of intent to file suit, thus giving the district court jurisdiction over his claims?

4. Question: May a representative plaintiff who brings suit under the ADEA represent similarly situated consenting plaintiffs who seek to opt into the lawsuit but who have not filed individual notices of intent to file suit pursuant to 29 U.S.C. § 626(d) of the Act?

5. Question: Assuming that a representative plaintiff's notice of intent to file suit may satisfy the notice requirement of 29 U.S.C. § 626(d) for all similarly situated claimants who could have filed timely notices of their own as of the date of the representative plaintiff's filing, under what circumstances are the consenting plaintiffs entitled to equitable tolling of the 180-day time period under 29 U.S.C. § 626(d) of the Act to maintain the viability of their claims until the representative plaintiff's filing, thus giving the district court jurisdiction over the consenting plaintiffs' claims as well?

STATUTORY PROVISIONS

1. The issues presented in this petition involve the following statutory enactments:

(a) The Judicial Code and Judiciary, 28 U.S.C. § 1292(b) and 28 U.S.C. § 1651, copies of which are appended hereto as Appendices 4 and 5, respectively.

(b) The Bankruptcy Act, 11 U.S.C. § 47(a) and (b) (1952) and The Bankruptcy Act, § 9(b) (1926), a copy of which are appended hereto as Appendix 6.

(c) The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(d), a copy of which is appended hereto as Appendix 7.

(d) The Fair Labor Standards Act, 29 U.S.C. § 216(b), a copy of which is appended hereto as Appendix 8.

(e) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-5(b) and (f)(1), a copy of which is appended hereto as Appendix 9.

STATEMENT OF THE FACTS

Prior to the occurrences made the basis for this lawsuit, Mr. C. M. Russell, Jr., plaintiff/respondent herein, was the District/Branch Manager of the Houston Division of Curtin Matheson Scientific, Inc. As such, he was ultimately responsible for the operations of the Houston District, and his specific responsibilities included directing personnel activity within his assigned district, as well as complying with all federal, state and local laws. (Russell depo. at p. 7-9, def. ex. 1.) In connection with such responsibilities, Mr. Russell received a copy of a 1968 company memo directing all branch managers to have age discrimination posters displayed prominently. Attached to the memo was a copy of the poster to be displayed. (Russell depo, at p. 12, def. ex. 2.) The government poster clearly explained the federal statute prohibiting age discrimination and advised any employee who believed that he had been unlawfully discriminated against to contact the Wage and Hour Division of the United States Department of Labor (hereinafter "DOL").

On or about February 23, 1973, the company passed over Mr. Russell for the position of District Vice Presi-

dent for Houston, and responsible company officials allegedly told him that they wanted a younger man for the job. (Russell aff. at p. 1.) Further according to Mr. Russell, on or about July 23, 1973, the company advised him that he had the choice of terminating his employment with the company or accepting a demotion to a sales representative position at his branch manager salary until March, 1974. Mr. Russell chose the latter option. (Russell aff. at p. 1.)

However, Mr. Russell took no action regarding the foregoing until November 12, 1973, when he filed an age discrimination charge with the DOL, protesting both the February 23 denial of promotion and the July 23 demotion. (Russell aff. ex. B.) In support of his charges, Mr. Russell also furnished the names of other employees who the company had recently fired or demoted. However, in his complaint, Mr. Russell requested only individual relief. (Russell aff. ex. B.) On November 13, and November 16, Mr. Russell furnished the DOL with additional information supporting his claim, including the names of additional employees who had recently been fired or demoted (Russell aff. ex. D, E.)

When he filed his original complaint with the DOL, Mr. Russell realized that such action authorized the DOL to conduct its *own* investigation of his charges. (Russell depo. at p. 31.) Nowhere in his original complaint did Mr. Russell state to the DOL that he intended to file his own lawsuit regarding the matter. (Russell depo. at p. 31-32.) *After* the filing of his complaint, Mr. Russell received from the DOL on or about November 14, 1973, a letter stating in part, "a pamphlet summarizing the provisions of the Act is enclosed for your information. As you will note on page 4, there are certain requirements

with specific time limits governing the circumstances under which an employee may file his own suit under this Act." (Russell depo. at p. 32, Worfe depo., ex. F.) Page 4 of the enclosed booklet stated, in part: "Before an individual brings court action, he must give the Secretary not less than 60 days notice of his intention. This notice must be filed within 180 days of the occurrence of the alleged unlawful practice." (Worfe depo. ex. 1.) Mr. Russell read the DOL letter of November 14 and the enclosed booklet. (Russell depo. at p. 32, 33.) On December 4, 1973, the DOL notified both the company and Mr. Russell that it had been unable to substantiate his charges. (Russell depo. ex. 3.) According to Mr. Russell, at this time a DOL representative also told him that he had three years within which to file suit.

Mr. Russell made no inquiry of the DOL concerning the necessity of filing a notice of intent to file suit in order to protect his right to sue at any time within three years, nor did he do anything else within the next 20 months to protect his rights or those of anyone else, until finally, on August 11, 1975, he filed an additional claim of discrimination against the company based on a denial of a promotion in August, 1975. (Russell depo. at p. 19-20, def. ex. 4.) Again, in his charge, Mr. Russell requested only individual relief. During the course of handling this matter, the DOL sent Mr. Russell a letter dated December 12, 1975, advising Mr. Russell of its unsuccessful efforts to conciliate the matter and further stating, "As you will note, there are certain requirements with specific time periods governing the circumstances under which an individual may file his own suit under this Act. The fact that you submitted information concerning alleged unlawful practice is not considered notice to the Secretary of

Labor of intent to file suit. We do not, of course, encourage or discourage such suits. The decision is entirely up to you." (Worfe depo. ex. G.)

Mr. Russell voluntarily terminated his employment with defendant Curtin Matheson Scientific, Inc. on October 15, 1975, retained an attorney and then filed a notice of intent to file suit regarding his last complaint on December 30, 1975. Pursuant to such notice, the DOL held a formal conciliation conference on February 10, 1976, which was attended by a DOL representative, Mr. Russell and his attorney, and company representatives. While conciliation discussions regarding Mr. Russell's claim were in progress, his attorney injected the fact that other persons were involved. Company representative Larry Gobert then advised the DOL representative that he did not realize that any other persons were involved, and thereafter, both he and the DOL representative tried to get Mr. Russell's attorney to disclose who the other people were, but his attorney refused to do so. Company representative Gobert then advised the DOL representative that he could not proceed with the conciliation of Mr. Russell's case in view of the various other claims of undetermined nature that would remain unsettled. He further advised the DOL representative that once they had something definite to present regarding the other claimants, the company would be willing to discuss the matter further. Thereafter, however, there were no further conciliation discussions regarding Mr. Russell or any other of the plaintiffs in this lawsuit. (Gobert depo. at p. 2, Price depo. at p. 2.)

On May 26, 1976, Mr. Russell commenced the instant action, more than three years after the initial act of alleged discrimination which he claims to have suffered.

At that time, Mr. Russell was joined by 12 other consenting plaintiffs, all of whom filed formal written consents to become parties to the action, but none of whom had previously filed timely individual notices of intent to file suit. All of the consenting plaintiffs had previously terminated their employment with petitioner Curtin Matheson Scientific, Inc. between July 3, 1973 and August 15, 1974. (Price aff. exs. A-M.)

Following the commencement of this action, defendants/petitioners moved to dismiss for lack of jurisdiction against all of the consenting plaintiffs and against representative plaintiff Russell with respect to all but his August 1975 claim, on the grounds that (i) plaintiff Russell had failed to file a timely notice of intent to file suit with respect to his February 23, 1973 and July 23, 1973 claims, (ii) none of the consenting plantiffs had filed individual notices of intent to file suit as required by law, (iii) that assuming a representative plaintiff might file a "class" notice of intent to file suit, representative plaintiff Russell's notice was insufficient in this regard since it failed to name the specific claimants composing the class so that the parties might be afforded an opportunity to conciliate the claims, as required by law, and (iv) assuming that a representative plaintiff's individual or "class" claim was sufficient to satisfy the notice requirement for a group of claimants, nevertheless such individual or "class" notice could inure only to the benefit of claimants who could have filed timely individual notices of their own at the time of the representative plaintiff's filing.

By order entered April 28, 1978, the District Court overruled petitioners' jurisdictional motion to dismiss on the grounds that representative plaintiff Russell was entitled to an equitable tolling of the notice requirements

with respect to all his claims, that a representative plaintiff could file an individual notice that would satisfy the notice requirements for a group of prospective claimants, that there were no deficiencies in the notice which representative plaintiff Russell had filed, and that the consenting plantiffs were also entitled to equitable tolling, and, therefore, representative plaintiff was entitled to represent them also. On May 8, 1978 petitioners filed with the district court their Motion for Reconsideration and in addition, pursuant to 28 U.S.C. § 1292(b), their Motion to Certify Controlling Questions of Law. By order entered July 10, 1978, the District Court amended its earlier order dated April 28, 1978 and also certified the controlling questions of law in its order, as amended, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On July 20, 1978, petitioners filed with the United States Court of Appeals for the Fifth Circuit their Petition for Permission to Appeal such controlling questions. By order entered August 15, 1978 the Fifth Circuit Court of Appeals denied petitioners leave to take the requested interlocutory appeal. Thereafter, petitioners filed the instant petition with this Court.

ARGUMENTS

Certiorari should be granted because:

1. The district court has rendered a decision on an issue concerning which the decisions of the courts of appeal are in conflict, and has further decided such issue in a way which conflicts with a prior decision of this Court;
2. the district court has decided an important question of federal law, concerning which the decisions of the various district courts are completely in conflict and which has not been, but should be, settled by this Court;
3. the district court's assumption of jurisdiction is so plainly wrong as to indicate failure to comprehend or a refusal to be guided by unambigious provisions of applicable statute, Supreme and appellate court authority and settled common law doctrine; and
4. the order of the court of appeals and the order of the district court in this cause are appropriately reviewable by common law writ of certiorari, the relief sought is not available in any other court, and cannot be had through other appellate processes.

We shall discuss each of these points separately.

1. The district court has rendered a decision on an issue concerning which the decisions of the courts of appeal are in conflict, and has further decided such issue in a way which conflicts with a prior decision of this Court.

In enacting the Age Discrimination in Employment Act, Congress expressly stated that "*no* civil action may be commenced by *any* individual" who had not complied with the Act's notice requirement and that such notice must be filed within 180 days of the alleged unlawful employment practice. 29 U.S.C. § 626(d) (emphasis supplied). In discussing the analagous notice provisions of Title VII, this Court stated that in "defining Title VII jurisdictional prerequisites 'with precision' . . . Congress

did not leave to the courts the decision as to which delays might or might not be slight.' " *Electrical Workers v. Robbins & Meyers Inc.*, 97 S.Ct. 441, 449 (1976). In further elaborating concerning those circumstances in which a plaintiff might be excused from failing to file within the statutorily prescribed time, the Court appeared to limit same only to those unusual instances in which a party had actually been "prevented from asserting" his rights. *Id.* at 441.

In addition to the express statutory language contained in both Title VII and the ADEA, as well as the language of *Electrical Workers*, this Court has recognized the need for a decision directly in point to insure that cavalier application of the equitable tolling doctrine does not erode the statutory time limits in question. However, this Court's initial efforts to fashion a rule of law governing the application of such doctrine were frustrated in the resulting 4 to 4 split in its consideration of *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided court*, 98 S.Ct. 600 (1977).

Without the benefit of this Court's anticipated guidance, the law has simply lost direction. Thus, in *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2nd Cir. 1978), the Second Circuit, in a Title VII context, correctly interpreted *Electrical Workers* and concluded that:

> "The decision in *Electrical Workers* strongly suggests that, even assuming the Title VII time limits are not strictly jurisdictional the tolling of those limits may be very restricted. The Court implied that tolling might be appropriate only where the defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue, but has mistakenly done so in the wrong form." *Id.* at 109.

However, the decisions of the Fifth Circuit have wavered considerably. Although that court took a rather restrictive view of equitable tolling in a case quite similar to, if not dispositive of the instant case, the court's alternate view generally permits equitable tolling almost as a routine accommodation. Compare *Adams v. Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977) with *Charlier v. S. C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977) and *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). Significantly, both *Charlier* and *Reeb* completely discarded the common law concept that equitable tolling is generally appropriate only where affirmative acts of a defendant have impeded suit. Note, *Developments-Statutes of Limitations*, 63 Harv. Law Rev. 1178, 1220 (1950).

This case again raises the equitable tolling issue in its starkest terms. Although petitioners herein do not urge that the notice requirement of § 626(d) is jurisdictional in its strictest sense, thus precluding equitable tolling under any circumstances, petitioners do say that such concept may be properly applied only where a defendant's wrongful acts or other extreme circumstances have prevented a claimant, despite his exercise of due diligence, from timely asserting his rights. The holding of the district court, with its unwarranted reliance upon *Charlier* and *Reeb*, clearly permits equitable tolling in favor of Respondent Russell under far less rigorous circumstances, when there has been no fault on the part of the employer and amid evidence that the claimant has defaulted in

significant respects in the protection of his own interests.[1] It would thus seem imperative that this Court articulate a rule of law insuring the proper and consistent application of the equitable tolling doctrine in this and other cases.

2. The district court has decided an important question of federal law, concerning which the decisions of the various district courts are completely in conflict and which has not been, but should be, settled by this Court.

With respect to the issue of whether each individual plaintiff in an ADEA action must satisfy the § 626(d)

1. Demonstrating the evils of unrestrained tolling as well as detracting from plaintiff Russell's individual equitable tolling argument is the disorganized way in which it developed. As the records in the district court in this proceeding indicate, respondent Russell initially saw no need for any equitable tolling argument and, accordingly, presented none. Thereafter, however, respondent Russell presented an affidavit to the court dated December 6, 1977, wherein in essence he stated that after filing his charge of discrimination with the DOL, he was never advised that any additional written notice was required to insure his ability to enforce his rights under the Act, and that he had been given a booklet which indicated that he had two or three years within which to file suit. After Defendants introduced into evidence the referenced booklet discrediting this explanation, Mr. Russell, in a subsequent deposition, changed his story and offered the thoroughly shopworn explanation that he had been instructed by an agent of the DOL upon termination of its investigation in December 1975, that he had up to three years to bring a lawsuit against the Company. Further, Mr. Russell in his deposition was unable to give any reason why he had not explained it that way to the court in the first place (Russell depo. at p. 37). Questions are raised concerning whether Mr. Russell is barred by the equitable doctrine of judicial estoppel from offering such contradictory testimony. E.g., *Holt v. Southern Railway Co.*, 51 F.R.D. 296 (E.D. Tenn. 1969); *Selected Risk Insurance Co. v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976). But in any event, application of the equitable tolling doctrine, in the instant case, rather than rectifying a wrong, simply confirms the far less deserving conclusion that "the wish is the father of the thought."

administrative notice requirement, the instant district court recognized in both *Cavanaugh v. Texas Instruments, Inc.*, 440 F. Supp. 1124 (S.D. Tex. 1977), and in its order in the instant case that the district courts are divided on the question.[2] Those courts which have concluded that a claimant who has satisfied the conciliation process should be able to bring legal action in behalf of himself and all other aggrieved employees without further resort to conciliation have relied on *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) allowing same in a Title VII context. Such courts have interpreted Section 216 of the Fair Labor Standards Act to provide further support for such conclusion in ADEA suits. Incorporated by reference as a part of the ADEA, Section 216 authorizes representative suits brought by "one or more employees for and in behalf of himself or themselves and other employees similarly situated." Thus, it has been argued that requiring each claimant in an ADEA suit to satisfy the § 626(d) notice requirement would largely nullify this section of the statute.

A piercing analysis of the issue however, demonstrates that the *Oatis v. Crown Zellerbach Corp.* analogy is not as facile as it might seem, since the conciliation provisions of Title VII and the ADEA are entirely dissimilar. Compare 42 U.S.C. § 2000-5(b) and (f)(1) with 29 U.S.C. § 626(d). In short, while the conciliation provisions of Title VII encourage the settlement of disputes in this manner, the provisions of the ADEA demand that conciliation be attempted before the initiation of formal legal proceedings. Such interpretation is confirmed by the legislative history of the ADEA, which un-

2. The cases on both sides of the question are conveniently catalogued in footnote 4 of the Cavanaugh decision.

equivocally states that in enacting the ADEA, Congress "intended that the responsibility for enforcement vested in the Secretary by Section 7, be initially and exhaustively directed through informal methods of conciliation, conference and persuasion and formal methods applied only in the ultimate sense." *U.S. Code Cong. and Admin. News*, p. 212-2218 (1967). Moreover, it seems too apparent to require extended comment that the above referenced interpretation of Section 216 of the FLSA largely nullifies § 626(d) which is a part of the basic fabric of the ADEA.

A recent analagous decision regarding the maintainability of class actions pursuant to the Federal Tort Claims Act appears to offer a means of correctly harmonizing such statutory provisions and directly supports the instant petitioners' contention that individual notice or at least a specific and informative "class notice" is required. In *Lunsford v. U.S.*, 570 F.2d 221 (8th Cir. 1977) the Eighth Circuit stated that a FTCA class action can be maintained only if each class member has filed an individual claim or if the named claimants have filed a "class claim" that names the claimants, asserts and establishes authority to present claims on behalf of class members and states the total amount of the class claim. The court reasoned that the Act's administrative exhaustion requirement (similar to the § 626 notice requirement) presupposes the existence of an identifiable claimant or claimants with whom the government can negotiate a settlement on the basis of a sum stated in the administrative claim. Without identifiable claimants or a sum certain, the government cannot evaluate the claim for possible settlement. In reaching such conclusion, the *Lunsford* court rejected

the *Oatis v. Crown Zellerbach* analogy under Title VII. Unlike Title VII actions, the court reasoned that the purpose behind the exhaustion requirement of the FTCA is to encourage pre-litigation settlement. As emphasized in earlier portions of this brief, the purpose of § 626(d) is exactly the same. Moreover, the instant case illustrates the wisdom of the *Lunsford* decision since petitioners were denied any meaningful opportunity to conciliate the charges of the instant claimants because of their inability to learn, and respondent's refusal to tell them, who the claimants were.

Finally, in *Price v. Maryland*, 561 F.2d 609 (5th Cir. 1977) the Fifth Circuit affirmed a district court's decision requiring that each plaintiff in an ADEA action file an individual notice of intent to file suit. Nevertheless the district court in the instant case refused to follow same, thus creating further controversy regarding this issue. Based upon the foregoing, it appears certain that such controversy will not be resolved until this Court decides the issue.

3. The district court's assumption of jurisdiction is so plainly wrong as to indicate failure to comprehend or a refusal to be guided by unambiguous provisions of applicable statute, Supreme and appellate court authority and settled common law doctrine.

The most startling feature of the district court's order in the instant case is the conclusion therein that the equitable tolling afforded representative plaintiff Russell should also be extended to all consenting plaintiffs. In *United Air Lines v. Evans*, 97 S.Ct. 1885 (1977), the Supreme Court clearly held that "a discriminatory act which is not made the basis for a timely charge . . . is

merely an unfortunate event in history which has no present legal consequences." *Id.* at 1889. Thus, even assuming that representative plaintiff Russell's notice of intent to file suit could satisfy the notice requirement for other claimants, it could do so only for those that could have filed timely notices of their own at the time of representative plaintiff Russell's filing. *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3rd Cir. 1975); *Cavanaugh v. Texas Instruments, Inc., supra* at 1128; *Pandis v. Sikorsky Aircraft Division of United Technologies Corp.*, 431 F. Supp. 793 (D. Conn. 1977). In the instant case, since all the consenting plaintiffs terminated their employment with defendant Curtin Matheson Scientific, Inc. between July 3, 1973 and August 15, 1974, and all of defendant's alleged discriminatory acts must necessarily have ceased against them at that point, all of the consenting plaintiffs' claims had become time-barred by the time Mr. Russell filed his notice of intent to file suit with the DOL on December 30, 1975. Thus, it would seem axiomatic that representative plaintiff Russell's notice could not resurrect such time-barred claims. Nevertheless, without explanation or citation of legal authority, the district court simply gave the consenting plaintiffs the benefit of the equitable tolling that it had ruled was due representative plaintiff Russell, thus permitting the "conclusion" that all of the consenting plaintiffs could have filed timely notices of their own at the time that representative plaintiff Russell did, and, therefore, his notice could satisfy the notice requirement for all.

Defendants respectfully submit that there is no legal basis for such conclusion. In each of his claims to the

DOL, representative plaintiff Russell requested only individual relief. Moreover, none of the consenting plaintiffs herein had placed any reliance on representative plaintiff Russell to protect their claims. As set forth in Mr. Russell's deposition, with the exception of plaintiffs DeRoch and James, the plaintiffs comprising the instant action constitute a completely different group of persons from those which representative plaintiff Russell mentioned in his November 1973 statements to the DOL. (Russell depo. at p. 25-26.) The instant plaintiffs terminated their employment at different times and were assigned to different company facilities located all over the country at the time of such termination. (Russell depo. at p. 26; Price aff. ex. A-M.) Representative plaintiff Russell played no part in contacting those persons ultimately comprising the group of plaintiffs in this lawsuit. (Russell depo. at p. 28-30.) After being advised in December, 1973, that the DOL could not substantiate his claim, representative plaintiff Russell did nothing during the next 20 months, in either his or their behalf, and might never have, had he not been passed over for a promotion he thought he deserved in August of 1975. Finally, none of the consenting plaintiffs have presented any evidence to justify equitable tolling in their individual cases. Accordingly, consenting plaintiffs cannot be heard to say that representative plaintiff Russell has done for them that which was required of them by law. Cf., *Inda v. United Air Lines,* 565 F.2d 554, 559 (9th Cir. 1977). Thus, in the end, the district court simply refused to follow unambiguous provisions of applicable statute, Supreme and appellate court authority and settled common law doctrine.

4. The order of the court of appeals and the order of the district court in this cause are appropriately reviewable by common law writ of certiorari, the relief sought is not available in any other court, and cannot be had through other appellate processes.

(a) Review of Court of Appeals Order

The All Writs Act, 28 U.S.C. § 1651 gives this Court power to grant a writ of certiorari to review the action of a court of appeals in declining to allow an appeal to it. 9 Moore's Fed. Practice ¶ 110.27. Thus, in *House v. Mayo,* 65 S.Ct. 517 (1945) the Court reviewed an appellate court's denial of an appeal to it regarding a petition for habeas corpus, and in doing so confirmed that

> "[n]ot only does our review extend to a determination of whether the circuit court of appeals *abused its discretion* in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal." *Id.* at 519. (emphasis supplied)

Similarly, the Court in the case of *In Re 620 Church Street Building Corporation,* 57 S.Ct. 88 (1936) reviewed a circuit court's denial of leave to appeal from an order of a district court under the Bankruptcy Act, 11 U.S.C. § 47(b), which at that time permitted such appeal only "in the discretion of the appellate court." (Appendix 6). In doing so, the Court stated that there is "ample authority for using the writ as an auxiliary process and as a means of 'giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.' " Considering this Court's acknowledgments in such cases, it would appear to follow

that the Court would also review, in a similar fashion, the issue of an appellate court's "abuse of discretion" in denying leave to appeal under 28 U.S.C. § 1292(b) when, as in the instant case, the district court has certified controlling issues in the case for interlocutory appeal.

Nevertheless, this Court has recently stated, albeit in dicta, that an appellate court may deny leave to appeal under § 1292(b) "for any reason, including docket congestion." *Coopers & Lybrand v. Livesay,* 46 LW 4757, 4760 (June 21, 1978). If this Court intended such statement to form an inflexible barrier to Supreme Court review of such appellate court rulings, certainly, this case puts the rule to the acid test. In general, § 1292(b) was designed to permit interlocutory appeals for the purpose of minimizing the total burdens of litigation on parties and the judicial system by accelerating, or at least simplifying, trial court proceedings. Note, *Interlocutory Appeals in Federal Courts, Under 28 U.S.C. § 1292(b),* 88 HARV. L. REV. 607 (1975). Moreover, in the congressional hearings related to the enactment of § 1292(b), four situations were identified where use of the interlocutory appeal procedure would be beneficial, including "cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action." *Id.* at 612. Clearly the overruling of a jurisdictional motion to dismiss virtually all claims in what will otherwise develop into a highly complex and lengthy employment discrimination lawsuit, certainly falls squarely within this category.[3] Moreover,

3. The trial itself would doubtless involve numerous witnesses from across the nation and the tedious job of feeding difficult statistical concepts to a jury. Simply determining back pay and

in addressing the instant petitioners' application for leave to appeal such order, the court of appeals was confronted with a case involving (i) highly controversial and important questions of law; (ii) questions concerning which the court of appeals had issued conflicting panel decisions [compare *Adams v. Federal Signal Corp., supra* with *Charlier v. S. C. Johnson & Son, supra*]; (iii) questions concerning which the district courts within its circuit had issued conflicting decisions [compare *Price v. Maryland Cas. Co.*, 62 F.R.D. 614 (S.D. Miss 1972) with *Cavanaugh v. Texas Instruments, Inc., supra*]; (iv) questions concerning which the court of appeals had issued apparently controlling decisions which the district court refused to follow [*Adams v. Federal Signal Corp., supra* and *Price v. Maryland Casualty Co., supra*]; and (v) an issue concerning which the district court had refused to follow unambiguous provisions of applicable statute, Supreme Court authority and settled common law doctrine. Finally, particularly in reference to this last issue, a mandamus action to the court of appeals would have been appropriate in the absence of § 1292(b),[4] and the court of appeals disposition thereof would have been reviewable in this Court. Thus, an absolute rule barring review of a court of appeals denial of leave to appeal under § 1292(b) would be contrary to numerous analogous precedents and exceedingly harsh in its result.

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reinstatement would be a particularly complex task. As stated in *International Bro. of Teamsters v. United States*, 97 S.Ct. 1843, 1873 (1977), "[t]he task remaining to the District Court . . . will not be a simple one."

4. It has been held that § 1292(b) prevents resort to mandamus actions concerning issues which are certifiable. Wright, *Federal Practice and Procedure: Permissive Interlocutory Appeals* § 3929 (1977).

(b) Review of District Court Order

Even if this Court determines that it may not review the issue of whether the court of appeals abused its discretion in denying petitioner leave to appeal under § 1292(b), it may still appropriately issue a writ directly to the district court since petitioner has already sought relief in the court of appeals. *United States Alkali Export Ass'n v. United States*, 65 S.Ct. 1120, 1124 (1945). Thus, the only question remaining is whether petitioner has satisfied the prerequisites for issuance of an extraordinary writ.

(c) Grounds for Issuance of Extraordinary Writ

The traditional use of such writs, both at common law and in the federal courts, has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction. *Ex Parte Peru*, 63 S.Ct. 793, 796 (1943). Thus, issuance of a writ in this case would be entirely appropriate to cure the jurisdictional excesses resulting from the district court's unfounded view that § 626(d) might be "honored in its breach."

Nevertheless, it has been said that extraordinary writs may not be used as a substitute for appeal, and therefore a writ will not issue where a matter can be effectively preserved for review following a final judgment. *Roche v. Evaporated Milk Association*, 63 S.Ct. 938 (1943). However, as an exception to this general rule, an extraordinary writ may still issue when a challenged assumption of jurisdiction is so plainly wrong as to indicate a refusal to follow unambiguous statutory provisions, Supreme Court authority or settled common law doctrine. Wright, *Federal Practice and Procedure: Jurisdiction* § 3933 (1977) (and authorities cited therein); see *De Beers Consol. Mines v. United States*, 65 S.Ct. 1130,

1132 (1945). That portion of the district court's ruling affording "equitable tolling" to the twelve consenting plaintiffs herein, if not the whole order in general, is so plainly wrong that the issuance of an extraordinary writ is warranted.[5]

Alternatively, this Court's view in *Roche v. Evaporated Milk Association*, that a writ may not be used as a substitute for an authorized appeal was grounded on the reasoning that where an appeal statute establishes the conditions of appellate review, a court "cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and *thwart Congressional policy against piecemeal appeals.*" *Roche v. Evaporated Milk Association, supra,* at 942-944 (emphasis supplied). However, such argument in the instant case meets itself coming back since Congress has, pursuant to § 1292(b), provided for interlocutory appeals in the instant circumstances and the only acceptable reason for the appellate court's refusal to entertain same, if any there be in this case, would be its inability to act because of docket congestion. Thus, issuance of a writ herein would, in effect, prevent the frustration of the Congressional policies sought to be advanced by the passage of § 1292(b).

Issuance of a writ would further prevent infringement upon the Congressional policies underlying § 626(d) of the ADEA. The hardship imposed by a long postponed appellate review, coupled with attendant infringement upon asserted Congressional policies, together support an appeal to the discretion of this Court to exercise its power

5. The petitioners have not styled the instant action as a mandamus in view of this Court's teachings that it does not matter much in what form an extraordinary remedy is afforded and that in the present situation certiorari may have advantages. Wright, *Federal Practice and Procedure: Writ Review Power* § 3932 (1977).

to review the rulings of a district court in advance of final judgement. *United States Alkali Export Ass'n v. United States, supra* at 1125.

CONCLUSION AND PRAYER

Petitioners can advance no better conclusion than that already penned by the Fifth Circuit in *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.,* 515 F.2d 1195, 1199 (5th Cir. 1975), wherein that court stated:

> "No forceful argument can be made in support of a complete waiver [of the administrative notice requirement] . . . We agree that the purpose of a 180-day period is to prevent consideration of stale claims and to promote peace as quickly as possible. . . . To read out of the statute this *central enforcement mechanism* would encourage or at least enable, an aggrieved individual to sleep on his rights until the statute of limitations has almost expired, removing all impetus to speedy resolution. All the interests heretofore referred to—the promotion of informal, good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources—are better protected through tolling than complete eradication of a clear Congressional directive." (emphasis supplied)

When equitable tolling is appropriate remains a seriously troubled area of the law, as is confirmed by the district court opinion in this case, which represents no less than a completely erroneous and unchecked waiver of the requirements of § 626(d). The Fifth Circuit's acknowledgment that "no forceful argument can be made in support of a complete waiver," and alternatively, the hardship upon Petitioners[6] and the attendant frustration of Con-

6. To date, discovery has been postponed pending disposition of Petitioners' jurisdictional challenge.

gressional policies underlying § 1292(b) and § 626(d) support Petitioners' request for an extraordinary writ.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this petition be granted and that writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, and alternatively to the United States District Court for the Southern District of Texas, Houston Division.

Respectfully submitted,

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Of Counsel:

ANDREWS, KURTH,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served upon Respondent by placing a copy thereof in the United States Mail, postage prepaid, certified, return receipt requested, addressed to his attorney of record, Ms. Carol Nelkin, Nelkin & Nelkin, 5417 Chaucer, Houston, Texas, 77005, on this the _____ day of September, 1978.

CLINTON S. MORSE

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 76-H-881

C. M. RUSSELL, JR., ET AL.,
Plaintiffs,

v.

CURTIN MATHESON SCIENTIFIC, INC., ET AL.,
Defendants.

ORDER

The above-styled-and-numbered cause is a civil action brought pursuant to 29 U.S.C. § § 621 *et seq.*, and 42 U.S.C. § 1981, in which plaintiffs seek injunctive and declaratory relief and damages arising from unlawful age discrimination allegedly committed by defendants in their employment practices. Certain motions under Fed. R. Civ. P. 12 are pending. Preliminarily, a short statement of the facts that appear from the affidavits and exhibits is necessary.

FACTS

Mr. C. M. Russell was employed by Curtin Matheson Scientific, Inc. (Curtin) from 1948 until October 15, 1975, the date of his termination of employment. From 1967 to sometime in mid-1973, Mr. Russell was branch manager for Curtin's home office in Houston. In mid-1973, Mr. Russell was demoted to the position of sales

representative while keeping the salary he had as branch manager.

In November of 1973, Mr. Russell contacted the Equal Employment Opportunity Commission (EEOC) in Houston for the purpose of ascertaining what rights, if any, he had against what he believed to be age discrimination. He was referred by the EEOC to the Department of Labor (DOL) and went there for the purpose of filing a charge of discrimination against his employer. Mr. Russell talked several times with a DOL investigator in November of 1973 and provided information concerning what he believed to be widespread discriminatory practices by his employer against older employees. At this time, Mr. Russell's complaints were reduced to writing by the investigator, and Mr. Russell signed the complaint forms and an authorization for the DOL to take whatever steps were necessary to enforce his rights. He was also given a booklet containing information about the time limitations for age discrimination suits.

In December of 1975 while contacting the DOL to supply additional information relating to his complaints, Mr. Russell was told that his original written charge of November, 1973, was insufficient for bringing a private lawsuit. Thereafter, Mr. Russell retained an attorney and filed a Notice of Intent to File Suit with the DOL on December 30, 1975. The DOL's attempts at conciliation having failed, Mr. Russell filed this action on May 26, 1976, seeking to represent himself and twelve other former employees of Curtin who simultaneously filed consents to become plaintiffs pursuant to 29 U.S.C. § 216(b).

None of the twelve consenting plaintiffs in this cause have filed any notice of intent to sue with the DOL

(except a Mr. R. E. James, Jr., whose notice was filed more than one year after his termination). Mr. Russell's notice of intent to file suit includes an allegation that Curtin maintains an overall policy of discrimination against employees on the basis of age but does not list these twelve plaintiffs by name. The termination dates of these consenting plaintiffs range from July 3, 1973, to August 15, 1974.

MOTION TO DISMISS FOR LACK OF JURISDICTION

The relevant provisions with respect to the bringing of a court action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, are set out in 29 U.S.C. § 626 (c) and (d):

> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.
>
> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 636(b) of this title applies, within three hundred days after

> the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

In the context of a suit under ADEA by a single individual, the Fifth Circuit has held that a timely filing of a notice of intent to file suit with the DOL is a prerequisite to federal jurisdiction. *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (1974).

Section 216(b) of 29 U.S.C. is part of the Fair Labor Standards Act made applicable to ADEA by 29 U.S.C. § 626(b). Section 216(b) provides in relevant part:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The Fifth Circuit has interpreted section 216(b)'s "opt in" type of class action as the only type available under ADEA, thus disallowing the use of Fed. R. Civ. P. 23. *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

Defendants have moved to dismiss this cause for lack of jurisdiction, contending: (1) that Mr. Russell's notice of intent to file suit (hereinafter referred to as the "section 626(d) notice") was not timely filed and (2) that none of the twelve consenting plaintiffs filed section 626(d) notices with the exception of Mr. R. E. James, whose notice was not timely filed. Defendants' motion raises questions involving the above-cited sections of title 29 which have not been resolved by the Supreme Court or the Fifth Circuit.

As to the timeliness of Mr. Russell's section 626(d) notice, he argues that the court should extend the time allowed for filing such notice beyond the 180 days stated in section 626(d) based on equitable considerations. In an affidavit filed in opposition to defendants' motion, Mr. Russell states:

> At the Labor Department [in November of 1973] I was interviewed at length about my complaint and I informed the investigator of numerous other instances of age discrimination at the Company. My complaints were reduced to writing by the investigator and I signed the written document setting forth my claim. I also signed a Labor Department form which authorized the Department of Labor to take whatever steps were necessary to enforce my rights. I contacted the Labor Department on November 13th and November 16, 1973 to give them additional information concerning the widespread discriminatory practices which were occurring at the Company to the older employees. At no time was I advised that any additional written charges were required to insure my ability to enforce my rights under the Age Discrimination in Employment Act. To the contrary, I was left with the distinct impression that I had done all that I could do and that the Labor Depart-

> ment would process my written claim. On November 14, 1973, I received a letter from the Department of Labor informing me that a conciliation officer would contact me in the near future. I was also given a booklet which indicated I had 2 or 3 years in which to file suit. At some point in time, I was informed that the Company was not interested in conciliating my claim. However, it was not until December of 1975, when I supplied the Department of Labor with additional information concerning my claim of age discrimination that I was made aware that the original written charge was insufficient for bringing a private lawsuit. I was informed of this situation by letter from the Department of Labor dated December 12, 1975. (See Exhibit A attached hereto) Upon being informed that an additional written document was apparently required, I contacted legal counsel and finally learned that a Notice of Intent to File Suit was required in order to further protect my rights. I immediately thereafter filed a Notice of Intent to File Suit with the Labor Department on December 30, 197[5].

Affidavit of Mr. C. M. Russell, dated September 6, 1977. During a deposition taken of Mr. Russell concerning his understanding of the time limits set forth in the pamphlet referred to in his affidavit, Mr. Russell states that he had been instructed by an agent of the DOL in December of 1975 that he had up to three years to decide if he wanted to sue the company.

The DOL's November 14, 1973, letter (to which Mr. Russell refers in his affidavit) acknowledged receipt of the complaint Mr. Russell filed against his employer, stated that the matter had been assigned to a compliance officer of the DOL who would be in touch with Mr. Russell, and directed Mr. Russell's attention to a portion

of an enclosed pamphlet dealing with time limits governing individual suits under the ADEA which states:

> The Secretary or any aggrieved person may bring suit under the Act. Suits to enforce the Act must be brought within 2 years after the violation, or in the case of a willful violation, within 3 years.
>
> Before the Secretary begins court action, the Act requires him to attempt to secure voluntary compliance by informal conciliation, conference, and persuasion. Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention.
>
> This notice must be filed within 180 days of the occurrence of the alleged unlawful practice except, when a State has taken action in accordance with its own laws prohibiting age discrimination, then an individual must file within 300 days of the alleged violation. The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion.

Department of Labor Publication on ADEA (1971), Defendants' Exhibit No. 1 to the deposition of Mr. Fred D. Worfe.

During a deposition taken of Mr. Fred D. Worfe, the assistant area director of the Houston Wage and Hour Division of the DOL, Mr. Worfe explained that pursuant to criticism of the sufficiency of notice to ADEA complainants of their rights and duties, form letters from the DOL to such complainants beginning sometime in 1975 included the following language:

> The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit. We do not, of course, encourage or discourage such suits. The decision is entirely up to you.

Exhibit No. 6 of the deposition of Mr. Fred D. Worfe. This statement was not included in the DOL letter of November 14, 1973, to Mr. Russell.

On the evidence presented, the court finds that Mr. Russell was affirmatively misled to believe that the complaint he filed with the DOL in November, 1973, was sufficient to protect his rights to bring suit against his employer under ADEA. The pamphlet Mr. Russell received is ambiguous in this regard as a matter of law because although it refers to the 180-day notice requirement, it in no way clarifies the difference between a complaint and a notice of intent to file suit.

The Fifth Circuit has indicated that in circumstances in which a plaintiff who failed to file a section 626(d) notice within 180 days did not have actual knowledge or the "means of knowledge" of this requirement and did not secure counsel during the 180-day period, the question of whether section 626(d)'s time limitation may be equitably tolled as a matter of law should be determined. *Charlier v. S. C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977). Because such circumstances exist on the facts presented in this cause, the court now addresses the question and decides that section 626(d)'s time limitation did not begin to run in Mr. Russell's case until he received actual notice of the requirement on December 12, 1975. The reasons for tolling 626(d)'s

time limitation are discussed at length in *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, ____ U.S. ____, 98 S.Ct. ____, 54 L.Ed. 270; *cf. Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), and will not be repeated here. Because Mr. Russell filed a section 626(d) notice well within 180 days of December 12, 1975, the court has jurisdiction over his claim. The court does not find *Adams v. Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977), applicable because this case involves the issue of knowledge of section 626(d)'s time limitation and not merely the issue of knowledge of the ADEA in general. The latter is all that the on-premises notice required by 29 U.S.C. § 627 and 29 C.F.R. § 850.10 involves.

As to the claims of the twelve consenting plaintiffs, the issue raised by defendants is whether section 216(b) permits one or more plaintiffs who have timely complied with section 626(d) to maintain an action under ADEA on behalf of similarly situated individuals who have filed the necessary consents under section 216(b) but have not filed timely notices with the DOL. The court is aware of several district court decisions falling on both sides of this question and has recently decided in favor of plaintiffs' position. In *Cavanaugh v. Texas Instruments, Inc.*, 440 F.Supp. 1124 (S.D. Tex. 1977), this court held, based on the purposes of section 626(d)'s notice requirement and based on the Fifth Circuit's holding in *Oatis v. Crown-Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), that a plaintiff who timely files notice with the DOL may maintain an action under ADEA on behalf of similarly situated individuals who

have not so filed. Consistent with the purposes of section 626(d), two limitations need be imposed:

> First, any consenting plaintiffs who have not complied with the notice requirements of [section 626 (d)] must be limited to the categories of claims raised before the Department of Labor by the representative plaintiffs.
>
> Secondly, the representative plaintiff in an ADEA action may only represent those similarly-situated individuals who could have timely complied with Section 626(d)'s notice requirement as of the date of the representative plaintiff's filing with the Department of Labor.

Cavanaugh, supra at 1128. The court rejects defendants' contention that *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977), affirmed more than the opt-in requirement imposed by the district court in that case.

Conceding *arguendo* the above, defendants contend that Mr. Russell's notice of intent to file suit was deficient in that it did not individually identify each of the twelve consenting plaintiffs by name, and therefore a suit may not be maintained on their behalf. Because of the limitation imposed by the court on the maintainability of class actions under section 216(b)—that any consenting plaintiff who has not filed with the Department of Labor is limited to the categories of claims raised before the Department of Labor by the representative plaintiff—the court finds that the representative plaintiff is not required to identify those similarly situated individuals whom he might seek to represent if conciliation efforts fail. Furthermore, the imposition of the requirement suggested by defendants would render

section 216(b)'s provision for a representative action virtually meaningless, as such a requirement would be tantamount to requiring each aggrieved individual to file an individual intent to sue with the DOL. Finally, with respect to Title VII class actions, the court is aware of no requirement that a representative plaintiff name the individuals he may seek to represent in the notice he files with the EEOC. Therefore, because all twelve consenting plaintiffs could have timely complied with section 626(d)'s notice requirement as of December 30, 1975, the date of Mr. Russell's filing, the court has jurisdiction over their claims pursuant to section 216(b).

MOTION TO STRIKE COMPENSATORY AND PUNITIVE DAMAGE ALLEGATIONS AND DEMAND FOR JURY TRIAL

Defendants' motion to strike compensatory and punitive damage allegations is controlled by *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1978), *cert. denied*, 46 U.S.L.W. 3518 (Feb. 21, 1978), and will be granted. Defendants' motion to strike the demand for a jury trial is controlled by *Lorillard v. Pons*, ____ U.S. ____, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), and will be denied.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants move to dismiss the complaint to the extent it seeks to predicate a claim for age discrimination upon 42 U.S.C. § 1981. Because this statute provides a cause of action only for race discrimination, this motion will be granted.

Therefore, for the reasons stated, it is ORDERED:

(1) that defendants' motion to dismiss for want of jurisdiction be, and the same is hereby, DENIED;

(2) that defendants' motion to strike plaintiffs' claims for compensatory and punitive damages be, and the same is hereby, GRANTED;

(3) that defendants' motion to dismiss plaintiffs' demand for a jury trial be, and the same is hereby, DENIED; and

(4) that defendants' motion to dismiss plaintiffs' claim for relief under 42 U.S.C. § 1981 be, and the same is hereby, GRANTED.

DONE at Houston, Texas, on the 28th day of April, 1978.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 76-H-881

C. M. RUSSELL, JR., ET AL.,
Plaintiffs,

v.

CURTIN MATHESON SCIENTIFIC, INC., ET AL.,
Defendants.

ORDER

Before the court in the above-styled-and-numbered cause on July 6, 1978, were the motions of defendants for reconsideration of the court's Order of April 28, 1978, denying defendants' jurisdictional motion to dismiss, and for certification of controlling questions of law pursuant to 28 U.S.C. § 1292(b). Pursuant to an order entered at the close of the conference concerning these motions, the court is entering this Order for the purposes of amending its April 28, 1978, jurisdictional order to certify controlling questions of law contained therein and to clarify the order with respect to one issue of law which was the subject of defendants' motion for reconsideration.

As to the latter purpose, it is ORDERED that this court's Order of April 28, 1978, be, and the same is hereby, AMENDED, so that the final sentence on page 11 which carries over to page 12 reads as follows:

> Therefore, given the court's finding that the running of the 180 days under section 626(d) should

be tolled from November 11, 1973, until December 12, 1975, all twelve consenting plaintiffs could have timely complied with section 626(d)'s notice requirement as of December 31, 1975, the date of Mr. Russell's filing, and therefore, the court has jurisdiction over their claims pursuant to section 216(b).

Pursuant to 28 U.S.C. § 292(b), this court's Order of April 28, 1978, is hereby amended to include the following paragraph:

> The court hereby finds that this order involves controlling questions of law, that there is substantial ground for difference of opinion as to the resolution of these questions, and that an immediate appeal on such questions would materially advance the ultimate termination of this litigation.

DONE at Houston, Texas, on the 10th day of April, 1978.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-8279

CURTIN MATHESON SCIENTIFIC, INC., ET AL.,
Petitioners

v.

C. M. RUSSELL, JR., ET AL.,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Southern District of Texas entered on July 10, 1978 is, denied.

APPENDIX 4

THE JUDICIAL CODE AND JUDICIARY

28 U.S.C. § 1292(b)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub.L. 85-919, 72 Stat. 1770.

APPENDIX 5

THE JUDICIAL CODE AND JUDICIARY

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

APPENDIX 6

THE BANKRUPTCY ACT

11 U.S.C. § 47(a) and (b) (1952).

(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

THE BANKRUPTCY ACT § 9(b) (1926).

(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 25) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 25 to be allowed in the discretion of the appellate court.

APPENDIX 7

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

29 U.S.C. § 626(d)

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

APPENDIX 8

THE FAIR LABOR STANDARDS ACT

29 U.S.C. § 216(b)

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon

the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

APPENDIX 9

CIVIL RIGHTS ACT OF 1964
TITLE VII

42 U.S.C. § 2000-5(b)

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference conciliation and persuasion.

42 U.S.C. § 2000-5(f)(1)

[I]f within 180 days from the filing of such charge . . . the Commission . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in such charge by the person claiming to be aggrieved . . .